SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 462

POWERS HIGGINBOTHAM,

Appellant,

versus

CITY OF BATON ROUGE,

Appellee.

Appeal from the Supreme Court of the State of Louisiana.

BRIEF ON BEHALF OF APPELLANT ON THE MERITS.

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SUBJECT INDEX AND CASES AND STATUTES CITED.

SUBJECT INDEX AND CASES AND STATUTES CITED—(Continued).

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STATEMENT OF THE CASE.

Plaintiff and appellant prosecutes this suit to recover from the City of Baton Rouge, State of Louisiana, the sum of Seven Thousand Nine Hundred Fifty-seven and 76/100 ($7,957.76) Dollars, representing a balance alleged to be due under a special contract of employment by the City, authorized by special legislative act, at a fixed salary and term of employment.

Some time prior to the expiration of the term of employment under the contract, and after appellant had entered into the service of the City, appellant was discharged without cause by the City acting under an Act of the Legislature authorizing the discharge and abrogation of the contract.

The appeal is from a final judgment of the Supreme Court of the State of Louisiana affirming the judgment of the trial court, dismissing the suit on an exception of no cause or right of action filed by defendant and appellee.

The case having been dismissed on an exception of no right or cause of action, the issues were determined by the Supreme Court of the State of Louisiana, and are determinable by this Honorable Court, on the facts set forth in plaintiff and appellant's petition. (See Transcript of Record, pp. 2 to 10, inclusive).

A concise statement of the facts, as disclosed by the pleading, appears in the printed "Statement As To Jurisdiction" filed by appellant in compliance with the rules of this Court. We feel a reiteration here of the facts unnecessary, and we will proceed to discuss the legal issues involved and which are presented to this Court for determination.

As we understand the Court's decision to hear this case on the merits, it leaves open for further consideration the question of want of jurisdiction in the Court as raised by motion filed by appellee to dismiss for lack of jurisdiction. Having briefed this issue at some length in opposi-

tion to the motion to dismiss, we omit at this time any further discussion of the question, feeling we have fully covered that issue; and as yet appellee has presented no reply. We respectfully refer the Court to that brief heretofore submitted.

CONTENTIONS OF APPELLANT.

The basis of appellant's claim, as set forth in the petition, is:

(a) That appellant's contract of employment by the City of Baton Rouge, under an ordinance adopted by the Commission Council of the City, and especially authorized by Act 13 of the Third Extraordinary Session of the Legislature of Louisiana of the year 1934, when accepted and acted upon by appellant, constituted a special contract of employment, for the period and for the compensation therein stated, and that appellant's rights under this contract are protected by the provisions of Section 15, Article 4 of the Constitution of the State of Louisiana and by the provisions of Section 10 of Article 1 of the Constitution of the United States; that no subsequent act of the Legislature and no action of the Commission Council of the City in furtherance of this legislative act, could abrogate the contract without cause.

(b) That having entered into his employment under the contract, and rendered service, and having been discharged without cause, appellant is entitled to recover from the City the balance of the compensation due him as fixed in the contract of employment covering the full period of his employment.

CONTENTIONS OF APPELLEE SUSTAINED BY THE STATE COURT.

The special contract of employment and its abrogation by discharge of appellant without cause is conceded. In justification of the discharge of appellant and the abrogation of the contract, it was urged by appellee and held by the State Supreme Court:

(a) That the contract of employment and its subsequent abrogation constituted an exercise of police power by the City and the Legislature of the State of Louisiana, and being an exercise of police power, Section 15, Article 4 of the Constitution of Louisiana, and Section 10 of Article 1 of the Constitution of the United States, must give way, and afford no protection to appellant (Tr. of Record, 19, 20).

(b) That under the contract of employment, appellant's status was that of an officer of the City or an employee performing governmental functions; therefore, appellant had no vested right under his contract and his discharge without cause leaves him without right of complaint or protection under said provisions of the Constitutions of the United States and of Louisiana (Tr. of Record, 19, 20).

(c) That if the amendment of Section 4 of Act No. 13 of the Third Extraordinary Session of 1934, by Act No. 1 of the First Extraordinary Session of 1935 did not terminate appellant's contract, it did permit the Commission Council of the City to do so, and that the City had the right to terminate the contract under its general charter powers (Tr. of Record, pp. 21, 22)

For answer to the contentions of appellee, and to show error in the decision of the State Supreme Court sustaining the contentions, appellant urges and relies on Assignment of Errors (1), (2), (3), (4) and (5), as stated beginning at page 30 and ending at page 32 of the "*Transcript of Record*" and the points set forth in the "*Statement of the Points on Which Appellant Intends to Rely*" found at page 34 to page 36 of the Transcript of Record.

ARGUMENT.

The contention and ruling of the State Supreme Court set forth under Paragraph (c) *supra* having been considered in brief heretofore filed in opposition to the motion to dismiss filed by appellee, and no answer as yet having been made by appellee, we will not further consider at this time the question.

The contract and its abrogation without cause being conceded, appellant's right of action necessarily follows unless the contentions urged by the appellee sustained by the State Supreme Court are sound.

Obligations resulting from lawful contracts are not only binding on the parties, but the Legislature of a state can not directly or indirectly impair such obligations or lessen their value, except in the legitimate exercise of police power. It is a well-established rule of law that a Legislature may at any time alter or modify the powers of a municipal corporation, but "When under the exercise of powers delegated, the rights of third persons have accrued and they have assumed the form of a contract with the corporation, the Legislature can not change the powers of

the corporation so as to impair the rights of its creditors." *New Orleans Canal and Banking Company v. City of New Orleans*, 30 La. Ann. 1276—citing among other authorities *Von Hoffman v. City of Quincy*, 4 Wall. U. S. 535, 18 L. ed. 403; *City of Kenosha v. Lamson*, 9 Wall. U. S. 477, 19 L. ed. 725; *State of Louisiana Ex Rel. Morris Ranger v. City of New Orleans*, 102 U. S. 203, 26 L. ed. 132.

> "A law enacted subsequent to a contract which, if valid, will have the effect of annulling the contract constitutes the most palpable form of legislative impairment, and such an enactment is clearly unconstitutional." 12 C. J., page 1057, Section 702, citing in support of the text Note 99, several decisions of the Supreme Court of the United States and other courts.

In the case of *Hall v. State of Wisconsin*, 103 U. S. (13 Otto) 5, 26 L. ed. 320, the Supreme Court of the United States announced:

> "When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded pro hac vice as a private person itself and is bound accordingly."

We deem further citation of authorities on this well-established general proposition unnecessary.

THE QUESTION OF POLICE POWER.

We now direct our attention to the ruling of the State Court *that the contract and abrogation thereof constituted an exercise of police power.*

This issue first presents the question, what is police power? We despair of answering with any degree of satisfaction to ourselves or to the court. Many courts down

through the years have attempted to define *police power;* but it appears to refuse to submit to a definite and fixed definition. There are as many definitions of this power as there have been judges attempting the task to define it. We will not burden the court with these many and varied definitions, a number of such definitions and attempts to visualize this power by courts will be found in *11 Am. Jur.*, Section 245, Page 966, to and including Section 251, Page 977; *12 C. J.*, Section 412, Page 904, to Section 416, Page 908, inclusive; also in the annotation to the cases of *State of Montana Ex Rel. v. Hawkins*, 53 A. L. R., title page 583, Anno. Page 595, and *State of Ohio Ex Rel. v. Skinner*, 93 A. S. R., Page 31.

The question as to what is police power is too vast and profound for an intelligent discussion and analysis in an ordinary case brief. But whatever be the correct concept and scope of this power, it has its limitations, though its limitations may be somewhat vague and indefinite.

> "Police power is not a universal solvent by which all constitutional guaranties and limitations can be loosened and set aside, regardless of their clear and plain meaning, nor is it a substitute for those guaranties." *(11 Am. Jur., Section 259, Page 993).*
>
> "As well stated by Justice Holmes, with regard to police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. This gradual process of determining its limitations is due to the fact that it is simpler to perceive the existence of the police power and to determine whether a particular case comes within the scope of the power than to give a definite rule which will be applicable to all cases." *(11 Am. Jur., Section 249, Page 975).*

Every act of a state or municipality is not an exercise of police power. Whatever is its character or limitation, it is a reserved power. Expressly created powers are not police powers, in the true sense, as we understand it. Many acts of a state or municipality flow from granted powers. Where there exists granted power, there is no need to look to police power.

If all acts of a state or municipality constitute the exercise of police power, and if in the exercise of such power a state or municipality is without restriction or limitation, there would be no such thing as constitutional government. *(11 Am. Jur. Sec. 259* and many authorities cited under *notes 13 and 14).*

While it appears from the authorities above cited, it is most difficult, if not quite impossible, to define the exact nature and scope of police power, there does not appear insurmountable difficulty in determining whether or not any particular case, or the exercise of governmental power in any particular circumstance, involves the use of police power.

There are instances of governmental action, or the exercise of governmental power so manifestly *not* an exercise of police power that the true character of such action is not difficult of detection or discovery. *Such, we submit, is the plain character of the Acts of the Legislature and the contract ordinance of the City of Baton Rouge destroying appellant's office to which he was elected, and contracting for his services as an ordinary employee of the City.*

It was not necessary for the Legislature in the enactment of Act 13 of the Third Special Session of 1934,

amending the charter of the city and destroying the office of Commissioner of Streets and Parks of the City and authorizing appellant's employment by the City, to call into play or invoke police power. The municipality being a mere creature and agent of the state, the Legislature was vested with express authority to amend its charter. Especially is this true as to that provision in the Act authorizing the employment of the appellant. This we believe to be elementary. No question of public morals, of public safety, of public health was involved in appellant's contract of employment *under the Mayor of the City and subject to the control of the Mayor and Commission Council.* No change in governmental policy affecting these matters vital to the public welfare was involved in the legislation. The employment or non-employment of appellant by the city was a mere unimportant incident in the life and property of the people of the city. The employment or non-employment of a particular individual by a city to render any services *under the control of its Mayor and governmental body* does not and cannot in any sense constitute the exercise of police power, a reserved power in constitutional governments for the protection of the morals, safety, health and general welfare of the people, and such action as employing and discharging an employee of a city can in no sense bring such action within the purview or scope of any definition or concept of police power.

The action of the City in making the contract of employment with appellant was merely carrying out the mandate and express grant of authority by the Legislature, and if the Act of the Legislature granting the authority

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was not an exercise of police power, neither was the contract based thereon an exercise of police power.

> "When a state descends from the plane of its sovereignty, and contracts with private persons, it is regarded pro hac vice as a private person itself and is bound accordingly." (Hall v. State of Wisconsin, 26 L. ed. [103 U. S.] Page 305, citing Davis) Greg 16, Wall 203, (83 U. S. 21, Page 447).

We submit further, if appellant's employment was an exercise of police power by the State and City, his discharge, without cause, could not have been an exercise of police power. If his employment was of such great importance to the safety, morals, health or general welfare of the people of the city, and it was necessary for the State or municipality to reach into the nebulous zone of police power for authority to contract with appellant for his services, certainly it cannot be said his discharge, without cause, arose from an exercise of police power, for the very simple reason, if his employment was for the vital public good, *salus populi*, appellant's discharge *without cause* could not be for public good, or to protect the safety, morals, and health of the people of the City, but to the contrary, detrimental and harmful. No exercise of governmental power violative of public welfare or injurious to the safety, morals, and health of its people can be a legitimate use of police power. *Police power is a reserved power for the public good and not for public wrong.*

The legislation in question does not, either in language or spirit, purport to be an exercise of police power, nor is it in its effect or accomplishment. *To contend or hold that it constitutes and exercises police power is to stretch the imagination, and to go far afield in a concept and application of this great power.*

IF AN EXERCISE OF POLICE POWER, THE ABROGATION OF THE CONTRACT WAS NOT A LEGITIMATE USE OF SUCH POWER.

Pertinent here and involved in the same question is the further question, that granting the contract of employment involved an exercise of police power, was the abrogation of the contract and the discharge of appellant a legitimate use or exercise of the power?

It does not suffice and affords to appellee no consolation or protection, as we understand the law as pronounced by this Court and other courts, to merely contend that the abrogation of the contract was an exercise of police power and stop at that. Not every act in exercise of police power immunizes the act from the protection of the contractual provisions of the Constitution of the United States. It must be found that the exercise of police power, in any particular case, *was legitimate, and necessary to protect the public health, the public morals, or the public safety* of the people.

> "Contracts between building and loan associations and their members, lawful when made, can not be abrogated, for no discernible public purpose, under the guise of amending the charter powers of such association."
>
> "Though the obligation of contracts must yield to a proper exercise of the police power, and vested rights can not inhibit proper exertion of the power, it must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end *and must not be arbitrary or oppressive.*" (Camille V. Treigle v. Acme Homestead Association, 297 U. S. 189-198, 80 L. ed. 575, Paragraphs 2 and 3 of the Syllabi). (Italics ours).

In the case of the *Panhandle Pipe Line Company v. State Highway Commission of Kansas*, 294 U. S. 613-623, 79 L. ed. 1090, the organ of this Court stated in the body of the decision as follows:

> "The police power of a state, while not susceptible of definition with circumstantial precision, must be exercised within a limited ambit and is subordinate to constitutional limitations. It springs from the obligation of the state to protect its citizens and provide for the safety and good order of society. Under it there is no unrestricted authority to accomplish whatever the public may presently desire. It is the governmental power of self-protection and permits reasonable regulation of rights and property in particulars essential to the preservation of the community from injury."

In the case of *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, it was ably and concisely stated by Mr. Justice Peckham, in considering the limitation on the exercise of police power by a state, as follows:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. *In every case that comes before this court, therefore, where legislation of this*

character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor." (Italics ours).

Again in the case of *Grand Trunk Western Railway v. City of South Bend, et al.*, 227 U. S. 544, 57 L. ed. 633, where the Court had under consideration the question presented here, Mr. Justice Lamar, the organ of the Court, stated:

"In every case like this, involving an inquiry as to whether a law is valid, as an exercise of the police power, or void, as impairing the obligation of a contract, the determination must depend on the nature of the contract and the right of government to make it. The difference between the two classes of cases is that which results from the want of authority to barter away the police power, whose continued existence is essential to the well-being of society, and the undoubted right of government to contract as to some matters, and the want of power, when such contract is made, to destroy or impair its obligation." New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co., 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

"The state, with its plenary control over the streets, had this governmental power to make the grant. There was nothing contrary to public policy in any of its terms, and being valid and innocuous,

the police power could not be invoked to abrogate it as a whole or to impair it in part. Walla Walla v. Walla Walla Water Co., 172 U. S. 17, 43 L. ed. 348, 19 Sup. Ct. Rep. 77."

In the first paragraph of the syllabi of the *Grand Trunk Western Railway Company Case*, cited *supra*, the Court announces as follows:

> "Whether the repeal of so much of a municipal ordinance granting trackage rights in a city street to a railway company as relates to double tracks was presumptively a reasonable exercise of the police power or a legislative impairment of the contract ordinance is a question which the Federal Supreme Court, on writ of error to a state court, must decide for itself, independently of the decisions of the state court."

The Legislature of the State of Louisiana with its plenary control of the governmental powers of the City of Baton Rouge was vested with the authority to authorize the employment of appellant by the city. There was nothing contrary to public policy, good morals, health or the general welfare of the people of the city involved in the mandate, and the contract of employment by the city under the mandate being "valid and innoxious, the police power can not be invoked to abrogate it as a whole, or to impair it in part." (*Grand Trunk W. R. Co. v. South Bend*, 227 U. S. 554, 57 L. ed. 640).

> "State legislation which impairs the obligation of a contract or otherwise deprives a person of his property can be sustained only when enacted for the general good of the public, the protection of the lives, health, morals, comfort, and general welfare of the people, and when the means adopted to

secure that end are reasonable." Re: People (Title and Mortg. Guar. Co.), 294 N. Y. 69, 190 N. E. 153, 96 A. L. R. 297.

In the body of the decision of the case reported in *96 A. L. R.* at page 304, the organ of the Court, Justice Lehman, in considering the question of the test for determining whether legislation unconstitutionally impairs contract obligation, stated in part, as follows:

> "The decisions of the United States Supreme Court do certainly establish these criteria; Legislation which impairs the obligation of a contract or otherwise deprives a person of his property can be sustained only when enacted for the promotion of the general good of the public, the protection of the lives, health, morals, comfort, and general welfare of the people, and when the means adopted to secure that end are reasonable. Both the end sought and the means adopted must be legitimate, i. e., within the scope of the reserved power of the state construed in harmony with the constitutional limitation on that power. Even the economic interests of the state may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

In the light of the foregoing authorities and the principles announced and well-established, we will consider the apparent purpose of Act No. 13 of the Third Extraordinary Session of 1934 and Act No. 1 of the First Extraordinary Session of 1935, amending and re-enacting Section 4 of said Act No. 13 involved here.

It is apparent, in our opinion, as indicated by the Acts, the sole purpose of the legislation was to destroy appellant's office to which he had been elected, and reduce

his status to that of a mere employee and create in lieu thereof a new office, designated as the "Department of State Co-ordination and Public Welfare" and provide a Commissioner for such newly created department, at the same salary as was carried by the elective office held by appellant, to be appointed by the Governor. It will be noted that no duties were given to this newly created office by the act, and all the powers and functions of the Commissioner of the Department of Public Parks and Streets were transferred to the Mayor of the city.

The amending act, Act No. 1 of 1935, merely amends Section 4 of said Act No. 13 of 1934, by removing all authority, powers and functions of the Department of Public Parks and Streets from the control of the Mayor, as provided in Act No. 13, and placing such authority, powers and functions under the newly created Commissioner of the Department of State Co-ordination and Public Welfare, to be appointed by the Governor, with the closing sentence, that "*The provisions of this section heretofore enacted requiring the employment of the person heretofore exercising the function of Commissioner of the Department of Streets and Parks be and the same is hereby repealed.*"

At the date of the adoption of said Act 13 of 1934, the City of Baton Rouge was operating under and controlled by Act 207 of the Legislature of Louisiana for the year 1912, known as the "Commission Form of Government Act." A comparison of this act with the provisions of said Act 13 will show that Act 13 is practically a reenactment of Act 207 of 1912, except the change affecting appellant and his office, as carried in Section 4 of the Act

Further evidence of this legislative juggling and its arbitrary purpose is that by Act 261 of 1936 the Legislature recreated the office of Commissioner of Public Parks and Streets for the City of Baton [illegible] the city government practically

Therefore, it is apparent the main purpose and results accomplished by this arbitrary legislation was to legislate plaintiff out of an elective office and demote him to the status of a special contractual employee, and then, without cause, authorize and induce the abrogation of the contract.

We submit, there is nothing in the record to show the need of such legislation; that the public health, morals or welfare of the people were in any way served thereby. The two acts, in character and import, speak louder than any language we may use to show their arbitrary and ruthless disregard of appellant's rights, constitutional and otherwise, with no public good in view or accomplished. If this action of the Legislature of the State of Louisiana, and of the Commission Council of the City of Baton Rouge in furtherance thereof, constitutes a legitimate exercise of police power, if it be police power, which we do not concede, then we are at a loss to know what rights are left, what rights are safeguarded, to an individual under the Constitution, from arbitrary political action and persecution. We are equally at a loss to understand when and under what circumstances does legislative enactment become arbitrary and in conflict with the contract provisions of the Constitution of the United States.

We fully appreciate the general rule that courts ordinarily will not inquire into motives of legislation. We are not seeking such an inquiry. We merely urge that the Court give full and careful consideration to the question of the unjust and arbitrary character of the legislation which attempts to destroy appellant's contract rights under the excuse of exercise of police power.

POWER AND DUTY OF COURTS TO DETERMINE THE QUESTION OF LEGITIMATE EXERCISE OF POLICE POWER.

This Court and all courts, as far as we have been able to find, have held it to be the right and duty of courts, whenever the question here is presented as an excuse for violating contract rights under the Constitution, to investigate and determine, first, whether such action involves the exercise of police power, and, if so, was it a proper or legitimate exercise thereof. The rule is concisely stated, and is borne out by the authorities cited in support thereof, in *11 Am. Jur.*, Paragraph 1 of Section 306, page 1087-1088, as follows:

> "In accordance with the general rule that where the validity of legislation is properly raised, it is the duty of the judiciary to determine its constitutionality, when police statutes are challenged as an invasion of rights and liberties guaranteed by the fundamental law, it becomes the duty of the courts to determine whether the exercise of power is really necessary for the public good. It has been frequently stated, in cases where the questions are presented for judicial review, that in order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare, and that if a statute discloses no such purpose, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court so to adjudge and thereby give effect to the Constitution. Only in cases, however, where the legislature exceeds its powers will the courts interfere or set up their judgment against that of the legislature. Thus, it is not the function of the Federal Supreme Court, under the authority

of the Fourteenth Amendment to the Federal Constitution, to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment and enforcement of laws of an arbitrary character which have no reasonable relation to the execution of lawful purposes." (See authorities, including decisions of this Court, cited under Notes 5 and 6, annotation in support of the text).

APPELLANT NOT AN OFFICER UNDER HIS CONTRACT OF EMPLOYMENT.

As to the second contention affirmed by the State Courts, that a public office was created, and, in a legal sense, the appellant remained a public officer, to perform a public function, and, therefore, the city had the right and power to discharge him at will. This contention and ruling by the State Court is best answered by the language of Section 4 of said Act 13 which destroyed appellant's office and authorized his employment by the city *"under the Mayor,"* considered together with the language of the contract resolution adopted by the Commission Council of Baton Rouge under the authority of the said act.

The express language of the Act and of the city ordinance clearly show the purpose was to destroy appellant's position as one of the elected officers of the City of Baton Rouge, and to give him the status of a mere employee of the City *under the control and direction of the Mayor.* If this were not true, the act and ordinance would have been for naught. Appellant was an officer of the City before the Act went into effect destroying his office, and if he retained the status of an officer under the contract of employment, then nothing was accomplished by the Act.

This, of course, is contrary to the legislative intention, and the Commission Council was without authority to give him the status of an officer when the Act had fixed his status as an employee. True, from the ashes of his office there rose another office and another officer, but it was not appellant's office nor was he its officer.

It will be noted that the Act creates no office for appellant to hold. It merely provides for his employment. There can be no officer without an office. The Supreme Court of the United States has so held. "There can be no officer, either de facto or de jure, if there be no office to fill." (*Norton v. Shelby County, State of Tennessee* [118 U. S. 263] 30 L. ed., Page 178).

Disregarding the expressed language of the Act and of the ordinance of the Commission Council, showing the expressed intention to give the appellant the status of a mere employee, there are numerous decisions of courts holding that positions of a similar character of employment as that held by the appellant, does not constitute the holder an officer.

> "In every definition of the word 'office,' the features recognized as characteristic, and distinguishing it from a mere employment, are the manner of appointment and the nature and duties to be performed, and whether the duties are such as pertain to the particular official designation and are continuing and permanent, and not occasional or temporary. State v. Board of Public Works, 17 Atl. 112, 51 N. J. Law (22 Vroom) 240."

> "An officer is distinguished from an employee in the greater importance, dignity, and independence of his position; in being required to take an official

oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or non-feasance in office; and usually, though not necessarily, in the tenure of his position. State ex rel. Cameron v. Shannon, 33 S. W. 1137, 1144, 133 Mo. 139; State ex rel. Kane v. Johnson (Mo.) 25 S. W. 855, 856; City of Baltimore v. Lyman, 48 Atl. 145, 146, 92 Md. 591."

"The term 'officer' as used in Const. Art. 18, 1, applies and refers to such offices as have some degree of permanency, and are not created by a temporary nomination for a single and transient purpose. Shurbun v. Hopper, 40 Mich. 503, 505 (citing Underwood v. McDuffee, 15 Mich. 361, 93 Am. Dec. 194)."

"The term 'office,' within the meaning of the Constitution does not include a levee inspector. State v. Green, 9 South. 42, 43, 43 La. Ann. 402."

"The position of chief clerk in the office of the assessor of the city of Detroit is not an officer. People v. Langdon, 40 Mich. 673, 682."

"A person employed by the city council to trim lights in its electrical light department is not a 'public officer.' There is no more reason for calling him such than there would be to call a person employed in the public streets to shovel dirt a 'public officer.' State v. Anderson, 49 N. E. 406, 497, 57 Ohio St. 429."

"The clerk of the street department having no duty to perform other than those directed by the street commissioner, his appointment was not to a public office, but was in the nature of a contract of employment. McAvoy v. Inhabitants of City of Trenton, 80 Atl. 950, 951, 82 N. J. Law, 101."

"The foreman of the Board of Health Department of a city being one of those engaged in the labor service of the city holds an 'employment' rather

than an 'office.' Garvey v. City of Lowell, 85 N. E. 182, 195, 199 Mass. 47, 127 Am. St. Rep. 468."

"Van Fleet v. Walsh, 122 Miss. 316, 202 N. Y. S. 745, holds Superintendent of Streets and Parks not an officer."

"Jones v. Battle Creek, 193 Mich. 1, 150 N. W. 145, holds Supt. of Highway not an officer."

"When the legislature makes a contract with a public officer, as in case of a stipulated salary for his services, during a limited period, is just as much a contract within the purview of the Constitutional prohibition, as a like contract between two private citizens. Hall v. State of Wisconsin, 103 U. S., Page 511, 26 L. ed. 305."

DIRECT CONSIDERATION OF THE DECISIONS OF THE STATE COURT.

The organ of the Supreme Court of the State of Louisiana in determining the issues in favor of the appellee makes statements and gives reasons, as follows:

"The plaintiff relies mainly upon the doctrine of the decision in Hall v. Wisconsin, 103 U. S. (13 Otto) 5, 26 L. ed. 320. The City of Baton Rouge on the other hand relies upon the decision in Newton v. Board of Commissioners of Mahoning County, Ohio, 100 U. S. 548, 25 L. ed. 710. Our opinion is that the present case is governed by the doctrine of Newton v. Board of Commissioners, and not by the decision in Hall v. Wisconsin. The position in which Powers Higginbotham was employed was in the nature of a public office, in that the duties and functions of the employee were governmental or administrative duties and functions. In Hall v. Wisconsin, the contract that was declared to be within the protection of Section 10 of Article 10 of the Constitution of the United States was a contract to make

a geological, mineralogical and agricultural survey of the State. In the opinion rendered in the case it was said, with reference to the so-called 'Commissioners', employed by the Governor to do the work, 'Their duties were specifically defined, and were all of a scientific character.' The duties or functions of the employees—called commissioners—were not governmental or administrative duties or functions, in any sense. They were just such functions or duties as the surveyors or commissioners would have had to perform if their contract had been made with an individual or with a private corporation, instead of the State.

"In Newton v. Board of Commissioners of Mahoning County it was held that the contract clause in the Constitution had application only to cases where the State laid aside her sovereignty and entered into a contract such as an individual might enter into. The author of the opinion in that case quoted from Chief Justice Marshall's opinion in the Dartmouth College Case,—The Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629,—in support of the proposition that the contract clause in the Constitution has no application where the statute in question is a public law having reference to the general welfare. And the author of the opinion in the Newton Case distinguished that case from the Dartmouth College Case, thus:

'The principle there laid down (in the Dartmouth College Case), and since maintained in the cases which have followed and (have) been controlled by it, has no application where the statute in question is a public law relating to a public subject within the domain of the general legislative power of the State, and involving the public rights and public welfare of the entire community affected by it.'" (Opinion of the Supreme Court of Louisiana, Tr. of Record, beginning at bottom of page 18 and ending at top of page 20).

We submit, and with all due respect to the organ of the Supreme Court of the State, the foregoing statements and conclusions are most unsound and erroneous. The *Newton v. Board of Commissioners of Mahoning County, Ohio, Case*, referred to by the learned Chief Justice, is clearly not applicable nor controlling here, factually or in legal principle involved. While on the other hand, the *Hall v. Wisconsin Case* is factually similar and in principle identical with the present case. The pertinent facts and the ruling thereon by the court in the *Newton v. Board of County Commissioners of Mahoning County, Ohio, Case* are succinctly stated in the syllabi of the case.

There the court had for consideration the authority of the Legislature of the State of Ohio, after by legislative act fixing a county seat in a certain county, to remove the county seat by subsequent legislation to another county. The issue arose on an action by the plaintiff in error in behalf of themselves and other citizens of the county for an injunction against the Board of County Commissioners to prevent the removal of the county seat as authorized or provided by the subsequent act of the Legislature. The plaintiff's urge that the earlier act of the Legislature fixing the county seat and what was performed under the act, constituted an executed contract binding on the State, and that the subsequent Act and action taken thereunder impaired the obligation of a contract as protected by the Constitution of the United States, Article 1, Section 10. In discussing the issues and reaching its conclusions adverse to the contentions of the plaintiff in error, the organ of the court, Mr. Justice Swayne, discussed broadly the contract clause of the Constitution and its limitation on the

governmental and police power of a state. It is very clear in this discussion the organ of the court had in mind governmental powers reserved in every Government, police power, to legislate *legitimately* and in *good faith* for the public health, morals and welfare of the people. We have no issue here with this broad and general principle.

On the other hand, in the *Hall v. State of Wisconsin Case* relied on by appellant, the court had for determination issues, in fact and principle, almost identical with the present case. In the *Hall Case*, the action of the Legislature in abrogating the contract entered into by the State with the plaintiff in error was defended and attempted to be justified on the same grounds urged by the appellee here, and which forms the principal basis of the decision of the Supreme Court of the State of Louisiana. These contentions had been sustained by the Supreme Court of the State of Wisconsin; they were repudiated by the Supreme Court of the United States and the judgment of the state court reversed.

In our view, the character of the work to be performed by the plaintiff in error under his contract with the State of Wisconsin and the character of the service appellant here may have been required to render under his contract with appellee does not call for or justify the application of different principles as indicated by the State court. It would appear that the prerogatives and discretionary action of the plaintiff in error under his contract with the State of Wisconsin were considerably broader and more discretionary than was given to the appellant under the contract of employment with the appellee. Under appellant's contract of employment he was to serve "*under*

the Mayor of the city." These words could have but one meaning, and that is he had no discretionary administrative control of governmental functions; that he was a mere employee subject to the orders of the Mayor and the Commission Council. His status was no more a public officer performing governmental functions than any other employee on the public streets to shovel dirt or gather garbage. (*State v. Anderson*, 49 N. E. 406, 497, 57 Ohio St. 429). The very purpose of the act, as we have heretofore noted, was to take from the appellant all power or semblance of an officer of the city, and to demote him to a mere special contract employee.

In the *Hall Case*, the Court announced in the syllabi:

> "1. One may be employed to perform a service under a contract with a State without becoming an officer.
>
> 2. A State may abolish any public office created by a public law, but a contract made by it for the performance of services by a 'commissioner' is within the protection of the Federal Constitution, and cannot be impaired by state legislation."

After stating the case, the organ of the Court, Justice Swayne, stated, in considering the question as to whether or not the plaintiff in error was an officer, as follows:

> "The proceeding is authorized by a local statute. The question raised by the record is within our jurisdiction. In the exercise of that jurisdiction in such cases this court is unfettered by the authority of State adjudications. It acts independently, and is governed by its own views. Pine Grove v. Talcott, 19 Wall, 666 [86 U. S., XXII, 227].

"The question to be considered was before us in U. S. v. Hartwell, 6 Wall, 385 [73 U. S., XVIII, 830]. It was there said that 'An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument and duties * * * 'A government office is different from a government contract. The latter, is necessarily *limited in its duration* and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.'

"In U. S. v. Maurice, 2 Brock., 96, Chief Justice Marshall said: 'Although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied. to perform a service without becoming an officer.' "

Again in the body of the decision, in considering the question, said:

"In a sound view of the subject it seems to us that the legal position of the plaintiff in error was not materially different from that of parties who, pursuant to law, enter into stipulations limited in point of time, with a State, for the erection, alteration or repair of public buildings, or to supply the officers or *employes* who occupy them with fuel, light, stationery and other things necessary for the public service. The same reasoning is applicable to the countless *employes* in the same way, under the National Government.

"It would be a novel and startling doctrine to all these classes of persons that the Government might discard them at pleasure, because their respective employments were public offices, and hence without the protection of contract rights.

"It is not to be supposed that the plaintiff in error would have turned his back upon like employment, actual or potential, elsewhere, and have stipulated as he did to serve the State of Wisconsin for the period named, if the idea had been present to his mind that the State had the reserved power to break the relation between them whenever it might choose to do so. Nor is there anything tending to show that those who acted in behalf of the State had any such view at that time. All the facts disclosed point to the opposite conclusion as to both parties.

"Undoubtedly, as a general proposition, a State may abolish any public office created by a public law, Newton v. Comrs., 100 U. S. 559 [XXV., 711], but even with respect to those offices the circumstances may be such as to create an exception. In the Dartmouth Coll. v. Woodward, 4 Wheat. 694, Justice Story said: 'It is admitted that the State Legislatures have power to enlarge, repeal and limit the authorities of public officers in their official capacities, in all cases where the Constitutions of the States respectively do not prohibit them; and this, among others, for the very reason that there is *no express or implied contract* that they shall always, during their continuance in office, exercise such authorities. But when the Legislature *makes a contract* with a public officer, as in case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens.'"

"When a State descends from the plane of its sovereignty, and contracts with private persons, it is regarded *pro hac vice* as a private person itself, and is bound accordingly. Davis v. Gray, 16 Wall. 203 [83 U. S., XXI., 447]."

In the *Dartmouth College Case*, 4 Wheat. at page 694, Mr. Justice Story, in concurring with Chief Justice Marshall, says:

> "But when the Legislature *makes a contract* with a public officer, as in case of a *stipulated salary* for his services *during a limited period*, this, during the limited period, is just as much a contract, within the purview of the constitutional prohibition, as a like contract would be between two private citizens."

The organ of the Supreme Court of the State of Louisiana in its decision here in attempting further to differentiate the *Hall v. Wisconsin Case* from the present case, states:

> "The duties or functions of the employees—called commissioners—were not governmental or administrative duties or functions, in any sense. They were just such functions or duties as the surveyors or commissioners would have had to perform if their contract had been made with an individual or private corporation, instead of the state."

It is not pointed out by the Court why the duties and functions of the plaintiff in error in the *Hall Case* were in no sense administrative duties or functions, and that they were just such functions or duties as the plaintiff in error would have had to perform in a contract with individuals or private corporations, while on the other hand the functions and duties of the appellant here under his contract did partake of such character. It would appear, as we have heretofore pointed out, the duties and functions of the plaintiff in error in the *Hall Case* were far more discretionary and broader than the duties and functions of the appellant under his contract. And it is not pointed

out why the duties or functions of the plaintiff in error in the *Hall Case* under his contract were "such functions and duties as the surveyors or commissioners would have had to perform, if their contract had been made with an individual or private corporation instead of the State," and, on the other hand, the duties and functions of the appellant under his contract were not of a like character. Certainly any individual or private corporation could have made with plaintiff a contract identical in terms and identical in service as called for in appellant's contract. We fail to see the difference, and the learned Chief Justice of the State Supreme Court has failed in his opinion to furnish any light thereon.

Further on in the opinion the learned organ of the Court, referring to Section 18 of Article 19 of the Constitution of the State of Louisiana which provides that, "The exercise of police power of the state shall never be abridged," makes this statement:

> "The reason why the contract clause in the Constitution is not applicable to contracts of employment of persons to perform governmental functions is that the Legislature is forbidden to make an irrevocable surrender of any of the police power of the State. It is so declared in Section 18 [Fol. 29] of Article XIX of the Constitution of Louisiana,—thus: 'The exercise of the police power of the State shall never be abridged.' Hence the contract clause in the Constitution does not interfere with the authority of the Legislature to repeal at any time any law under which an individual has been employed to perform governmental functions, and, by such repeal, to put an end to the contract of employment."

We must in all due respect seriously differ with this broad pronouncement. It is not in accord with the jurisprudence of the State of Louisiana. But granting that such broad pronouncement is in harmony with the interpretation given to the said article of the Constitution of the State of Louisiana by its highest court, it would be a holding or rule of interpretation which would come in conflict with Section 10 of Article 1 of the Constitution of the United States and in direct conflict with the decisions of the Supreme Court of the United States.

The learned Chief Justice further states here:

> "The reason why the Commission Council employed Mr. Higginbotham to serve as Superintendent of Public Parks and Streets until the next general election of the municipal officers,—as stated in the ordinance dated January 9, 1935—was that, by the provisions of Act No. 13 of the Third Extraordinary Session of 1934, Mr. Higginbotham had *'the right to continue in said office during good behavior and until the next regular municipal election'*." (Transcript of Record, pp. 20, 21).

The learned Chief Justice then proceeds to intimate that Act No. 13 of the Third Extraordinary Session of the Legislature of 1934 may be deemed unconstitutional "on the ground that the appointing of a particular individual to fill *a particular office* or position is not a legislative function."

We make this reference in order to point out an error in the statement. Act No. 13 of the Third Extraordinary Session of the Legislature of 1934 does not provide that Mr. Higginbotham had "The right to continue in said

'*office*' during good behavior until the next regular municipal election." The exact language of the Act, as has been heretofore pointed out, is as follows: - "Provided that the person now filling the office of the Commissioner of the Department of Public Parks and Streets of the City" (Appellant) "shall be entitled to *enter the employ* of the said city of Baton Rouge, at a salary equal to that heretofore allowed by law to said person as the Commissioner of the Department of Public Parks and Streets in the *work* under said Mayor and said person shall have the right to continue in *said service* during good behavior until the next general election of officers in said municipality." (Subdivision (1), Section 4, Act 13, Third Extraordinary Session, 1934). (Italics ours).

The remaining reasons of the State Court for judgment, beginning with last paragraph of page 21 of the "Transcript of Record," as we have hereinabove stated, are covered by appellant's brief heretofore submitted on motion to dismiss filed by appellee on ground that the case presents a substantial non-Federal question.

In conclusion, we wish to take note of the following last statement of the decision of the State Court.

> "There is no good reason why the city of Baton Rouge, in this case, should be held liable in damages for the alleged breach of a contract of employment which the city was compelled by an act of the Legislature to consent to, and which the city was compelled by another act of the Legislature to put an end to. Our conclusion, therefore, is that the judgment appealed from is correct."

The import of this statement is not clear. If the learned Chief Justice means to hold that there is immunity as to the appellee because it acted by legislative mandate and not of its own volition, we are unable to follow him. The statement overlooks and fails to consider the relationship of the municipality to the state, that it is merely a governmental instrumentality of the State. All of its rights and powers are derived from the State. A municipality cannot escape contractual obligations on the ground it was acting under legislative mandate in making the contract. It has no authority to make any contract unless it is authorized or impliedly authorized by a grant of power from the State. If the statement of the learned organ of the State Supreme Court means what it appears to announce, there could be no valid and enforcible contracts with a municipality. Of course, such is not the law.

Respectfully submitted,

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